UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

SARAH WINGARD, *on behalf of herself and all others similarly situated,*	)	
	)	
Plaintiff,	)	Civil Action No.:
v.	)	1:16-CV-1539-ELR
	)	
COMCAST CORPORATION,	)	
	)	
Defendant.	)	

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Plaintiff's Complaint should be dismissed because it fails to allege any facts from which a court could conclude that Comcast used an "automatic telephone dialing system" ("ATDS") as that term is defined in the Telephone Consumer Protection Act ("TCPA"). Comcast's Motion explained that: (1) Plaintiff offered only conclusory statements that parrot part of the statutory definition of an ATDS; and (2) even if those statements were viewed as factual allegations, they would still be insufficient because they say nothing about any dialing equipment's ability to "use a random or sequential number generator" to "produce" or "store" telephone numbers, which is required by the clear and unambiguous language of the statute.

Plaintiff does not convincingly argue otherwise. On the contrary, she tacitly concedes that her Complaint is lacking, as she takes the remarkable position that she need not plead ***any*** facts to support the assertion that Comcast used an ATDS, and then relies on statements about the number of alleged calls rather than the functionality of alleged equipment. Alternatively, Plaintiff tries to retreat from the statutory definition altogether by arguing that half of it should simply be ignored (which is wrong as a matter of law) or that her pleading actually complied with it (which is wrong as a matter of fact). Comcast therefore respectfully requests that the Court grant its Motion and dismiss Plaintiff's Complaint.

II. ARGUMENT

A. Plaintiff Has Not Alleged Any Facts Showing That An ATDS Was Used

Plaintiff's primary argument is that her failure to allege facts regarding the equipment that was used to call her is irrelevant because "a plaintiff need not allege *any* facts to support an allegation that an ATDS was used by a defendant." Opp'n at 5 (emphasis in original). In other words, she believes that her Complaint should not be dismissed for failure to state a claim because she is not required to state a claim in the first place.

That is not—and cannot be—the proper pleading standard in federal court. As Comcast explained in its Motion, United States Supreme Court authority requires more than a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted).

Rather, complaints must allege facts that "nudge[]" a plaintiff's claims "across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). There is no reason why that rule should apply with any less force in TCPA actions, class actions, or any other actions for that matter. *See, e.g., Weaver v. Wells Fargo Bank N.A.*, No. 15-1247, 2015 WL 4730572, at *3 (M.D. Fla. Aug. 10, 2015) ("To state a claim under Section 227(b)(1)(A)(iii), a plaintiff must ***plausibly allege***—not merely assert—***facts*** suggesting that the defendant used a[n] [ATDS]." (emphasis added)). Plaintiff is wrong to suggest that requiring her to comply with Rule 8 would be "contrary to the public policy behind the TCPA." Opp'n at 13. After all, *Twombly* was a putative class action asserting antitrust violations and *Iqbal* was a civil rights action asserting racial and religious discrimination claims. In both the Supreme Court required the pleading of facts, not the parroting of statutes.

Taken to its logical—or illogical—extreme, Plaintiff's point is that Rule 8 can be satisfied by incanting the magic words "the defendant used an ATDS." That is wrong as a matter of law; the statute enumerates the facts that must be true in order for a court to conclude that dialing equipment qualifies as an ATDS, and Rule 8 requires that plaintiffs plausibly plead those facts in order to state a claim. It is not surprising, then, that numerous courts have dismissed TCPA complaints that consisted of superficial statements that parroted the statutory definition. *See* Mot. at

5–6 (collecting cases); *see also Flores v. Adir Int'l, LLC*, No. 15-0076, 2015 WL 4340020, at *4 (C.D. Cal. July 15, 2015) (finding that "alleging *any measure of automation*" is not enough "to allege the *specific form of automation* necessary to sustain a claim under the TCPA.") (emphasis in original); *Speidel v. JP Morgan Chase & Co.*, No. 13-0852, 2014 WL 582881, at *2 (M.D. Fla. Feb. 13, 2014) (dismissing claim because plaintiff's ATDS allegations "merely follow the language of the statute"); *Moore v. Online Info. Servs., Inc.*, No. 13-61167, 2014 WL 11696696, at *2 (S.D. Fla. Jan. 10, 2014) ("Without enhancing the complaint with anything more than the statutory language, Plaintiff provides only a threadbare, 'formulaic recitation of the elements' of a TCPA cause of action, which does not suffice." (citations omitted)).

Plaintiff's authority is not to the contrary, as the plaintiffs in those cases all pleaded facts on which the courts relied in reaching their decisions. For example, in *De Los Santos v. Millward Brown, Inc.*, No. 13-80670, 2014 WL 2938605 (S.D. Fla. June 30, 2014), the court relied on the factual allegation that the plaintiff heard "dead air" upon answering the calls, which it deemed a "signature of autodialing." *Id.* at *3. In *Hashw v. Department Stores National Bank*, 986 F. Supp. 2d 1058 (D. Minn. 2013), the court relied on the factual allegation that the plaintiff had received "112 calls over a relatively short period of time from the same telephone number," which was a fact "from which the use of an ATDS can be inferred." *Id.* at 1061. In *Buslepp v. B & B Entertainment, LLC*, No. 12-60089, 2012 WL 1571410 (S.D. Fla. May 3, 2012), the court relied on the factual allegation that "numerous other persons received the same text to their cell phones." *Id.* at *2. And in *Aikens v. Synchrony Financial*, No. 15-10058, 2015 WL 5818911 (E.D. Mich. July 31, 2015), that court actually ***rejected*** the argument that Plaintiff is making here. In doing so, it distinguished "both *Buslepp* and *De Los Santos*" because the plaintiffs in both cases had provided "detail regarding the content of the messages or calls, thereby rendering the claim that an ATDS was used more plausible." *Id.* at *3.

Even the decision that Plaintiff attached to her Opposition does not help her. *See Mitchell v. Northside Hospital*, No. 14-0087, slip op. (N.D. Ga. Sept. 9, 2015). On the contrary, the court acknowledged that a complaint should be dismissed if it does not contain "either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Id.* at 3. Although it did deny the defendant's motion to dismiss, it did so based on factual "allegations . . . that defendant made numerous telephone calls to plaintiff's cellular phone ***using a prerecorded voice***." *Id.* at 4 (emphasis added). That is critical because the TCPA creates a right of action for consumers who receive a call that used ***either*** an ATDS ***or*** a prerecorded voice. 47 U.S.C. § 227(b)(1)(A) ("It shall be unlawful for any person . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any [ATDS] ***or*** an artificial or prerecorded voice." (emphasis added)). Accordingly, the claim in *Mitchell* was different from the one asserted here, and it survived dismissal based on allegations that were different from any made here.

Alternatively, Plaintiff argues that her Complaint did in fact satisfy Rule 8. However, her argument is as conclusory as her pleading. *See, e.g.*, Opp'n at 2 ("In Paragraph 12, Plaintiff alleges that an ATDS was used to call her cell phone."); *id.* ("Plaintiff's Complaint adequately and sufficiently allege[s] that Defendant utilized an ATDS to place the calls that are the subject of this litigation."); *id.* at 11 ("Plaintiff alleged that Comcast used an ATDS to place the calls to her and the class members."). Although she says that she offered "additional, circumstantial allegations" from which the use of an ATDS could be inferred, *see* Opp'n at 6-7, her pleading is unlike those in the cases she cites. *Hashw*, 986 F. Supp. 2d at 1061 ("112 calls over a relatively short period of time from the same telephone number"); *Mashiri v. Ocwen Loan Servicing, LLC*, No. 12-2838, 2013 WL 5797584, at *5 (S.D. Cal. Oct. 28, 2013) ("over 100" alleged calls during two months in 2012). On the contrary, she alleges that she received "multiple calls" —perhaps as few as eight calls—from three different numbers over a nearly sixtyday period, and alleges nothing about the content of any of those calls. *See* Compl. ¶¶ 16-17. If that moves the needle from "possible" to "plausible," anything does.

B. Even If The Court Treats Plaintiff's Statements As Factual Allegations, They Still Would Not Show That An ATDS Had Been Used

Comcast's Motion also explained that, even if the Court treats Plaintiff's conclusory statements as factual allegations, the Complaint still fails to state a claim because those statements do not correspond to the statutory definition. *See* 47 U.S.C. § 227(a)(1). Plaintiff's Opposition argues that the statutory definition is either irrelevant or has been satisfied here. Neither argument is convincing.

Plaintiff begins by arguing that the statutory definition of an ATDS is irrelevant because that term was subsequently "defined" in various rulings from the Federal Communications Commission ("FCC"). *See* Opp'n at 13. Specifically, she cites a 2003 FCC ruling that stated that a "predictive dialer falls within the meaning and statutory definition of [ATDS]." Opp'n at 15 (quoting *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14,014, ¶¶ 131-33 (2003)). Her reliance on that ruling is misplaced, however, because she neither alleges nor argues that Comcast called her using a "predictive dialer," which was the focus of that ruling. *See, e.g.*, Mot. at 9 n.1 ("The 2003 FCC Order . . . focused on 'predictive dialers,' which Plaintiff does not allege was used here."). Moreover, even if the FCC's "predictive dialer" rulings were relevant here, the fact remains that the FCC "does not have the statutory authority to change the TCPA's definition of an ATDS." *Marks v. Crunch San Diego, LLC,* 55 F. Supp. 3d 1288, 1291 (S.D. Cal. 2014); *see also Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372-73 (3d Cir. 2015). Because the statutory definition is "clear and unambiguous," the vastly broader "definition" suggested by the FCC is irrelevant as a matter of law.

Alternatively, Plaintiff argues that her pleading is in fact consistent with the statutory definition, which extends only to equipment that has the capacity:

> (A) to store or produce telephone numbers to be called, ***using a random or sequential number generator***; and
> (B) to dial such numbers.

47 U.S.C. § 227(a)(1) (emphasis added). As Comcast explained in its Motion, the phrase "using a random or sequential number generator" is not superfluous. *See, e.g., Dominguez,* 629 F. App'x at 372–73 (explaining that equipment "must be able to store or produce numbers that *themselves* are randomly or sequentially generated" and agreeing with trial court's "definition of 'random or sequential' number generation (i.e., the phrase refers to the numbers themselves rather than the manner in which they are dialed) and its holding that the statutory definition does in fact include such a requirement...." (emphasis in original, footnotes omitted)); *Marks,* 55 F. Supp. 3d at 1292 ("If the statute meant to only require that an ATDS include any list or database of numbers, it would simply define an ATDS as a system with 'the

capacity to store or produce numbers to be called.'").[1] Because Plaintiff alleged nothing at all about the use of a "random or sequential number generator," her pleading is deficient and should be dismissed. *See Gragg v. Orange Cab Co., Inc.*, 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014) (plaintiff failed to establish that equipment could "autonomously randomly or sequentially generate numbers to be dialed as required to fulfill the statutory definition").

Citing the "nearest-reasonable-referent" rule, Plaintiff argues that the phrase "using a random or sequential number generator" modifies "to be called" rather than "to store or produce." Opp'n at 17. That is wrong for two overarching reasons.

First, "to be called" is not a "reasonable referent" for the participial phrase "using a random or sequential number generator." The statutory definition of an ATDS is divided into distinct subsections: subsection (A), which concerns how numbers are ***generated***; and subsection (B), which concerns how they are ***dialed***. The "using a random or sequential number generator" language in subsection (A) necessarily refers to how numbers are "stored" or "produced," not how they are "called" at some point in the future. That is clear from the fact that the participial phrase speaks in terms of the use of a "random or sequential number ***generator***." 47 U.S.C. § 227(a)(1) (emphasis added). It would make no sense to read the definition as requiring that numbers be "***called***, using a random or sequential number ***generator***." *Id.* (emphasis added).

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[1] In light of these decisions, it is simply not credible for Plaintiff to suggest that Comcast's statutory argument has been "uniformly rejected." Opp'n at 13. Plaintiff has no meaningful response to either decision. Indeed, she does not even discuss *Marks*. As for *Dominguez*, her attempt to distinguish it is unavailing. Although it is true that the appeal in *Dominguez* stemmed from a motion for summary judgment rather than a motion to dismiss, the Third Circuit made clear that the statutory definition is "explicit," and that the FCC did not eliminate the definition's "random or sequential number generator" requirement. *Dominguez*, 629 F. App'x at 372-73 & nn.1, 2. Plaintiff cites older decisions that disagreed with the trial court's decision but cites no decisions that disagree with the more recent Third Circuit opinion.

Indeed, the comma in subsection (A) confirms that the participial phrase ("using a random or sequential number generator") modifies the infinitive verbs ("to store or [to] produce") rather than the phrase "to be called," which functions only as an adjective that modifies the noun "telephone numbers." If "using" modified "to be called," as Plaintiff suggests, there would be no need for the comma in subsection (A). Again, the conduct that is relevant to subsection (A) is the generation of numbers, not the dialing of numbers. How those numbers are "to be called" in the future is addressed separately in subsection (B). If Congress had intended for the "random or sequential" requirement to apply to the way numbers are "called," it would have simply placed that language in subsection (B) after the infinitive verb "to dial."[2]

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[2] Plaintiff also argues that "sequential" means in any "order" whatsoever. *See* Opp'n at 17-18. Several courts that have analyzed the statutory definition have rejected such a broad reading of it. *See Griffith v. Consumer Portfolio Serv., Inc.*, 838 F. Supp. 2d 723, 725 (N.D. Ill. 2011) ("'[R]andom number generation' means

Second, even if "to be called" were a "reasonable referent" for the clause "using a random or sequential number generator," Plaintiff ignores the exception to the "nearest-reasonable-referent" rule that applies if "several words are followed by a clause which is applicable as much to the first and other words as to the last." *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920). In such cases, "the natural construction of the language demands that the clause be read ***as applicable to all***." *Id.* (emphasis added). When several words are similar, are placed next to each other, and are all capable of being modified by the modifying language, the "nearest-reasonable-referent" rule does not apply. *See, e.g., U.S. v. Pritchett*, 470 F.2d 455, 458-61 (D.C. Cir. 1972) (interpreting statute that referred to "members of the Army, Navy, or Marine Corps of the United States or of the National Guard or Organized Reserves when on duty" and holding that "when on duty" modified *all* military branches rather than just "Organized Reserves"). Here, as noted above, the natural reading of subsection (A) is that the participial phrase ("using a random or sequential number generator") modifies both infinitive verbs ("to store or [to] produce").

random sequences of 10 digits, and 'sequential number generation' means (for example) (111) 111–1111, (111) 111–1112, and so on."); *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014) (same) (quoting *Griffith*); *Marks*, 55 F. Supp. 3d at 1292 ("'[S]equentially generated telephone numbers" are those that are numerically sequential, such as (111) 111–1111, (111) 111–1112, and so forth."). Indeed, a contrary reading would all but "nullify the clause." *Id.*

Nor does the "nearest-reasonable-referent" rule apply when doing so would confuse or impair the meaning of the sentence, which would be the case here. *See, e.g.*, *Miniat v. Ed Miniat, Inc.*, 315 F.3d 712, 715 (7th Cir. 2002) ("'[L]ast antecedent' . . . is defined as the 'last word, phrase or clause that can be made an antecedent ***without impairing the meaning of the sentence***.'" (emphasis in original, citation omitted)). Indeed, Plaintiff's reading results in an absurdity. Plaintiff would have the Court find that anything is an ATDS so long as it can: (1) store numbers; and (2) dial numbers. If those were the only two requirements, however, the definition would be limitless, and virtually anything—including most notably any mobile phone or tablet with a contact list—would be subject to potential liability under the TCPA. That cannot be what Congress intended.

Finally, Plaintiff is wrong to suggest that Comcast's reading of the statute would render the word "store" superfluous. *See* Opp'n at 17. Indeed, the Third Circuit rejected that very argument in light of the plain language of the statute. *See Dominguez*, 629 F. App'x at 373 & n.1 ("To the extent the District Court held otherwise, we clarify that the statutory definition is explicit that the autodialing equipment may have the capacity "to store *or* to produce the randomly or sequentially generated numbers to be dialed.") (emphasis in original). Ultimately, the parties have offered two drastically different readings of the statute: Plaintiff's, which is ungrammatical, unlimited, and untethered to the plain language of the statute, and Comcast's, which is none of those things. It follows that Plaintiff's reading should be rejected and her claim should be dismissed.[3]

[3] Plaintiff alternatively requests an opportunity to amend her Complaint. Comcast opposes this request because nowhere in her Opposition does Plaintiff suggest what additional facts she might supply in order to state a viable claim. *See* Opp'n at 20. Should the Court permit an amendment, however, Comcast reserves the right to challenge an amended pleading by way of a renewed motion to dismiss.

III. CONCLUSION

For the foregoing reasons, Comcast respectfully requests that its Motion be granted and this action be dismissed.

Respectfully submitted this 6th day of October, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served on the individuals listed below, depositing the same in the United States Mail and via the court's electronic filing system, on this 6th day of October 2016.

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